No. 78-1382

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JUANITA KREPS, SECRETARY OF COMMERCE,
APPELLANT

v.

ASSOCIATED GENERAL CONTRACTORS OF
CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The initial opinion of the district court in this case is reported at 441 F. Supp. 955. The opinion of the district court on remand from this Court (J.S. App. A)[1] is reported at 459 F. Supp. 766.

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[1] "J.S. App." refers throughout to the Appendix to the Jurisdictional Statement in No. 78-1108.

JURISDICTION

On October 20, 1978, the district court re-entered its judgment of November 2, 1977, holding unconstitutional Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 117, 42 U.S.C. 6705(f)(2), and enjoining the Secretary of Commerce from continuing to enforce the statute. Notice of appeal to this Court (App., *infra*) was filed on November 17, 1978. On January 10, 1979, Mr. Justice Rehnquist extended the time for filing a jurisdictional statement to and including March 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether the district court erred in concluding that the controversy in this case is not moot, either because it is capable of repetition, yet evading review, or because it presents a case of voluntary cessation of challenged activity in the face of legal challenge.

2. Whether the minority business enterprise provision of the Public Works Employment Act of 1977 and the regulations issued pursuant to the statute are invalid under the Fifth Amendment to the Constitution or Title VI of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 117, 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

STATEMENT

1. In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispersing the funds through the Economic Development Administration. The Act provided that the funds were to be available for the period ending September 30, 1977 (Section 111, 90 Stat. 1002). In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar

projects. The total of six billion dollars was to be available for the period ending December 31, 1978 (42 U.S.C. 6710).

The new statute, entitled the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, made various changes in the 1976 Act, including the addition of Section 103(f)(2), 42 U.S.C. 6705(f)(2), the "minority business enterprise" provision. Section 103(f)(2) provided that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under the Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." This requirement is subject to waiver by the Secretary under circumstances detailed in regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)).

Congress ensured that funds appropriated under the Act would reach the private sector by requiring state and local grantees to contract with private contractors for the construction of the projects. Section 103(e)(1), 91 Stat. 116, 41 U.S.C. 6705(e)(1).

As authorized by the Act, the Secretary of Commerce issued regulations to implement the minority business enterprise provision. The regulations provided (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434 (1977)):

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

2. On October 5, 1977, appellees—various contractors and associations representing contractors, subcontractors and suppliers in the California construction industry—filed this action in the United States District Court for the Central District of California seeking declaratory and injunctive relief. Specifically, appellees sought to bar the Secretary of Commerce and the defendant political subdivisions, the City and County of Los Angeles, from enforcing Section 103(f)(2) in the 65 grants approved by the Secretary for the Los Angeles area. At that time, all the grants authorized by the Act had been made, but no contracts had been let for any of the Los Angeles construction projects (441 F. Supp. at 960-961).[2]

The district court granted a temporary restraining order barring the defendants from letting any con-

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[2] Grants of $29,782,108 and $28,109,085 were awarded for projects in Los Angeles City and Los Angeles County, respectively. 441 F. Supp. at 961.

tracts under the Act pending further order of the court (441 F. Supp. at 958). After a consolidated hearing on the motion for a preliminary injunction, the motion for a permanent injunction and cross-motions for summary judgment, the district court on November 2, 1977, granted appellees' motion for summary judgment and issued declaratory and permanent injunctive relief. The court held Section 103(f)(2) of the Act and the Secretary's regulations unconstitutional and contrary to Title VI of the Civil Rights Act of 1964 (441 F. Supp. at 1044).[3] The Act violated the Due Process Clause of the Fifth Amendment, the Court held, because it established "an invidious rac[ial] quota" (441 F. Supp. at 965) and did not "advance a governmental purpose unrelated to race" (*ibid.*). The Act was not properly remedial in nature, the court concluded, because, in the court's view, there was insufficient evidence of discrimination before Congress when it enacted Section 103(f)(2), and no such evidence had been presented in the one-day hearing on the merits (441 F. Supp. at 965-966). The court further concluded that underemployed minorities in the construction industry could be aided by racially neutral legislation having a less detrimental impact on non-minority contractors (441 F. Supp. at 965).

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[3] The court did not discuss the regulations, but it apparently held the regulations invalid because it considered the statute to be invalid.

The court enjoined future enforcement of Section 103(f)(2) and the Secretary's regulations, but its order specifically provided that it did not apply to funds previously granted by the Secretary or to any action taken by any of the defendants with respect to those funds (441 F. Supp. at 1044). Because of this limitation, the injunctive order had had no effect on the expenditure of any funds or on the conduct of any of the parties. No further grants were made after the court's order because all the funds authorized by Congress had already been granted. Congress has not authorized appropriations for additional grants under the Act. With regard to the funds already granted for projects in Los Angeles City and Los Angeles County, all prime contracts except one have now been let,[4] and all of those let were in com-

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[4] Because of an inadvertent error, we incorrectly stated in our previous Jurisdictional Statement (No. 77-1271 p. 6) that "all the contracts for the 65 projects in the Los Angeles area that were the subject of the appellees' suit have been let in compliance with Section 103(f)(2)." In fact, while all initial prime phase contracts had been let, one prime contract for the second phase of a project remains to be let.

Los Angeles County received a grant of $853,500 for the Charmlee Park project. The project was to be constructed in phases. A contract of $249,342 was let for the first phase of the project prior to our earlier submission to this Court, but the second phase contract had not been let (Affidavit of Darrel C. Johnson). That contract was scheduled to be let in late September 1978, but was delayed because there was a legal challenge to the construction of the project on the ground that it violated environmental laws. It is now unclear when, or whether, that contract will be let.

pliance with the requirements of Section 103(f)(2) and the Secretary's regulations.

3. All parties appealed to this Court. Appellees sought to have the district court's injunctive order broadened, while the local governmental entities and the Secretary of Commerce sought to have that judgment overturned. On July 3, 1978, this Court vacated the district court's judgment and remanded the case to the district court to consider the question of mootness (J.S. App. 4 n.3).

On remand, the district court held that the case is not moot, and it reinstated its earlier judgment (*id.* at 32). The court noted that the Secretary had apparently granted all the funds allocated and appropriated under the Act (J.S. App. 5, 13).[5] Nonetheless, the court held that the case is not moot for two reasons.

First, the court held that the question of the constitutionality of Section 103(f)(2) or a similar minority business enterprise provision is "capable of repetition, yet evading review" (J.S. App. 14-22). It is capable of repetition, the court held, because several bills proposing increases in federal public works funding had been introduced in 1978, each of which contained some kind of proposed minority business enterprise provision (J.S. App. 17-19). Although none of the

[5] The Court observed that the defendants had made this contention and that the plaintiffs apparently conceded that this was correct (J.S. App. 5). Although the court made no factual finding on this issue, it based its ruling on the assumption that the funds had in fact been allocated.

bills was enacted, and although the minority business enterprise provisions in the various bills differed significantly, the court nonetheless held that the introduction of the bills demonstrated Congress's "intent to distribute again federal funds based on a person's race, and race alone, by way of some sort of race quota provision, to the exclusion of nonminority contractors and without a sufficient finding of prior discrimination" (J.S. App. 19).

The court held that the controversy is likely to evade review because of "the speed with which Congress has in the past and will undoubtedly in the future legislate that the funds [for public works programs] be spent" (J.S. App. 20). The 1977 Act required the Secretary of Commerce to process applications and grant funds within four-and-one-half months, and the bills that had been proposed in 1978 had also contained short time limitations for the allocation of the appropriated funds (J.S. App. 21). Therefore, the court held, "the speed which Congress has dictated, and will dictate again, to bind the Secretary of Commerce in spending these federal funds will preclude any opportunity for considered appellate review prior to the dates by which the funds will be exhausted" (*ibid.*).

The second ground on which the court held that this case was not moot was that it falls within the doctrine that a party cannot render a case moot by voluntarily ceasing the activity complained of when a suit is brought challenging that activity (J.S. App. 22-28). The court held that there had not been a sufficient

showing to persuade it "that Congress will not again distribute more funds to contractors solely on the basis of race" (J.S. App. 27). In the court's view, then, the defendants had failed to convince the court "that their allegedly wrongful conduct is not reasonably likely to recur" (J.S. App. 28), and that a finding of mootness "would leave the defendants 'free' to return to [their] old ways" (*ibid.*).

On the merits, the court held that this Court's decision in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), supported its conclusion that Section 103(f)(2) of the Public Works Employment Act of 1977 is unconstitutional (J.S. App. 30-32). The court ruled that under the decision in *Bakke*, it had correctly concluded that Section 103(f)(2) is invalid because, *inter alia*, Congress could have promoted employment of minority group contractors by means "less intrusive" than the 10 percent minority business enterprise participation requirement in the statute. As an example, the court noted that the more flexible minority business enterprise provisions contained in several of the bills introduced in 1978 "while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system" (J.S. App. 31). The court therefore "reiterate[d] its views that the 10% race quota was not a constitutionally acceptable means of promoting the Congress' legitimate interest in promoting employment in the construction industry among minority group members" (J.S. App. 31-32).

The court therefore denied the motions to dismiss the case as moot and reinstated in full its judgment

entered on November 2, 1977 (J.S. App. 32). Appeals have been taken by the local governmental entities (Nos. 78-1108, 78-1114) and by various intervenors (No. 78-1107). The appellees, who appealed from the district court's initial judgment, have not appealed from the present judgment.

DISCUSSION

1. The district court erred in holding that this case is not moot because it is "capable of repetition, yet evading review" (J.S. App. 14). The court concluded that Congress was likely to enact similar legislation in the future and that it was likely that the new legislation would require the expenditure of funds so quickly that the question of the validity of the legislation would escape appellate review. This interpretation of the "capable of repetition, yet evading review" exception to the mootness doctrine is erroneous for several reasons.

First, the possibility that Congress may in the future authorize similar public works projects with similar minority preference provisions is not, without more, sufficient to avoid mootness. See *Spreckels Sugar Co.* v. *Wickard*, 131 F.2d 12 (D.C. Cir. 1941); see also *Preiser* v. *Newkirk*, 422 U.S. 395, 402-403 (1975); *Allee* v. *Medrano*, 416 U.S. 802, 818-819 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 496-498 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 108-110 (1969). The failure of any of the three bills containing minority business enterprise proposals to be enacted during 1978 undercuts rather than supports

the district court's conclusion that Congress is almost certain to authorize further funding of programs subject to a minority business enterprise provision or enact new legislation similar to the 1977 Public Works Employment Act.

Second, even if Congress should at some time in the future provide new funding for public works employment acts such as the 1977 Act or enact new legislation providing a preference for minority contractors, it is likely that any constitutional challenges to the new statutory provisions would arise in a significantly different context. The several public works employment bills introduced in 1978 contained differing minority business enterprise provisions, and it is by no means clear that any future legislation will track the minority business enterprise provision at issue in this case. Differences in the congressional findings supporting any new minority business enterprise provisions and in the degree and kind of the minority preference may make a significant difference in the constitutional analysis, as this Court made clear in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978).

For that reason, this case is similar to those in which the action is held moot because any further challenge to a particular action will arise in a different setting. See, *e.g.*, *Allee* v. *Medrano*, *supra*, 416 U.S. at 818-819; *Hall* v. *Beals*, 396 U.S. 45, 49-50 (1969). It is unlike those cases involving a series of identical but rapidly expiring orders all of which present the same continuing legal dispute between

the parties, but none of which are in effect long enough to permit appellate review. *E.g.*, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 178-179 (1968); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911).

Third, the district court erred in holding that any future minority business enterprise legislation is likely to evade review. Although the 1977 Act required fairly rapid dispersal of grant funds, the minority business enterprise provisions apply to the contracting process following the grant, which ordinarily extends over a much longer period. The fact that this case has apparently become moot is attributable to the district court's injunctive order, which was made inapplicable to any funds already granted by the Economic Development Administration. Because all the funds authorized by the Act had already been granted at the time the court entered that order, the court's order has had no practical effect on the process of letting contracts and subcontracts in the projects receiving funds under the Act. For that reason, the contracting process has progressed without interruption by the court's order during the 18 months following the filing of this lawsuit.

This case is therefore different from cases in which the impediment to review is that the dispute is based on short-lived phenomena in which the court cannot readily preserve the status quo by ordering temporary relief. See *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 546-547 (1976) (gag order terminating when

jury is impaneled); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (one-year residency requirement for divorce); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974) (strikes); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (pregnancy); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972) (three-month residency requirement for voting); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969) (nominating process for each election).

2. The district court also erred in relying on the "voluntary cessation" doctrine to hold that this case is not moot. That doctrine is intended to prevent defendants from avoiding review of challenged action by temporarily halting that action just long enough to have any legal action against them dismissed as moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

In this case, there has been no "voluntary cessation" of challenged conduct in order to avoid judicial review of the conduct; the challenged statutory scheme has simply not been re-funded or otherwise re-enacted. The reason that voluntary cessation does not render a case moot is that as soon as the court dismisses the action, the defendant "is free to return to his old ways." *United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 632. If the court determines that the defendant is simply waiting for the dismissal of the action to resume the challenged conduct, it is accurate to say that there is a continuing controversy

between the parties, even though the controversy may be in a stage of latency. In this case, however, there is no indication that Congress has forgone enacting further minority business enterprise provisions in order to render the district court's order in this case moot. See *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 402. The challenged action in this case has not been "discontinued" in any realistic sense; it has simply proceeded to a natural conclusion in the manner contemplated at the time the 1977 Act was passed.

In our initial jurisdictional statement in this case (*Kreps* v. *Associated General Contractors of California*, No. 77-1271), we noted that there were two possible grounds on which there could still be a live case or controversy concerning the application of Section 103(f)(2) to the 65 Los Angeles projects at issue in this case. First, if there were any subcontracts or supply contracts remaining to be let that would be affected by Section 103(f)(2) and the Secretary's regulations, some plaintiffs might have had standing to seek to expand the district court's injunction. Second, we noted that Section 103(f)(2) might have some future effect if a minority subcontractor or supplier defaulted in the course of an ongoing project, since under the statute and regulations grantees are required to make their best efforts to ensure that the statute is complied with throughout the life of the project. If such a default occurred, and if the grantee proposed to re-engage a minority subcontractor or supplier, we noted that a plaintiff non-minority subcontractor or supplier might have

standing to complain of the operation of the statute. We added, however, that these possibilities were entirely speculative, as there was nothing in the record to indicate that either of these two contingencies had occurred or was likely to occur.

The district court made no findings on either of these points. Instead, the district court rested its holding that the case was not moot on the two doctrines discussed above. As we have shown, those doctrines do not support the court's ruling. In the absence of any findings with respect to the other possible grounds on which this case could be found not to be moot, we submit that the proper disposition of this case is to vacate the judgment of the district court as moot, without prejudice to the plaintiffs' right to refile the action if they can show some ground on which the case may continue to present a live controversy.

This disposition is particularly appropriate in light of the nature of the relief granted by the district court in this case. The district court's order did not prohibit the defendants from distributing any of the funds appropriated by Congress or from letting contracts under the 1977 Act in accordance with the provisions of Section 103(f)(2) and the Secretary's regulations. Because all of the funds authorized by the Act had been granted at the time of the court's order and because the court's injunction was limited to funds not yet granted, that order has had no effect whatever on the administration of the program in Los Angeles. In this context, the only effect

of the declaratory judgment portion of the district court's order has been to serve as a warning to Congress that if it should again enact legislation such as the minority business enterprise provision in Section 103(f)(2), the court will be prepared to rule it unconstitutional. This use of the declaratory judgment remedy, in the absence of a judicial response to a present live controversy, is improper. Cf. *Muskrat* v. *United States*, 219 U.S. 346 (1911).

3. Should the Court determine that there remains a justiciable controversy in this case, we submit that the question presented here is substantial and that the Court should note probable jurisdiction and set the case for argument.

The district court has held an Act of Congress facially unconstitutional on the ground that it established an impermissible racial classification, something that this Court has never done.[6] A number of courts have considered the constitutionality of the Act challenged here. The only court of appeals to decide the merits of the constitutional issue upheld the statute. *Fullilove* v. *Kreps*, 584 F.2d 600 (2d Cir. 1978), petition for cert. pending, No. 78-1007. Two courts of appeals have affirmed denials of preliminary injunctions that were sought to enjoin enforcement of the provision on the ground, among

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[6] In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the Court upheld the appellants' claim that federal statutes applicable to the District of Columbia were unconstitutional as applied by the District of Columbia school officials. In that case, of course, the racial classification was not, as it is here, designed as a remedy for racial discrimination.

others, that plaintiffs had failed to show a sufficient likelihood of success on the merits to warrant interim relief. *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, 580 F.2d 213 (6th Cir. 1978). Twelve district courts have upheld the constitutionality of the statute and three district courts, including the court below, have held the statute unconstitutional, either on its face or as applied.[7] But for the

[7] Cases upholding the constitutionality of the challenged provision are: *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 446 F. Supp. 553 (D.R.I. 1978); *Associated General Contractors of Kansas* v. *Secretary of Commerce*, No. C.A. 77-4218 (D. Kan. Feb. 9, 1978); *Indiana Constructors, Inc.* v. *Kreps*, No. IP 77-602-C (S.D. Ind. Jan. 4, 1979); *Associated General Contractors, Alaska Chapter* v. *Kreps*, No. F78-1 (D. Alas. Oct. 10, 1978), appeal filed, No. 78-3421 (9th Cir. Oct. 19, 1978); *Frank Coluccio Construction Co.* v. *Kreps*, No. F78-9-Civ. (D. Alas. Oct. 5, 1978).

Decisions denying preliminary injunctions are: *A. J. Raisch Paving Co.* v. *Kreps*, No. C.A. 77-2497 (N.D. Cal. Dec. 15, 1977), appeal filed, No. 77-3977 (9th Cir. Dec. 20, 1977); *Florida East Coast Chapter, Associated General Contractors* v. *Secretary of Commerce*, Nos. C.A. 77-8351 Civ. J. W. (S.D. Fla. Nov. 3, 1977); *General Building Contractors Ass'n* v. *Kreps*, No. C.A. 77-3682 (E.D. Pa. Dec. 9, 1977); *Virginia Chapter, Associated General Contractors* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (D.S.C. 1977); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, No. C.A. M-77-165 (W.D. Mich. Jan. 4, 1978).

Decisions adverse to the constitutionality of the statute, in addition to the decision in this case, are *Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977) (statute unconstitutional as applied); *Montana Contractors Association* v. *Secretary of Commerce*, Nos. CV 77-62-M, CV 77-153-BLG (D. Mont. Jan. 10, 1979) (statute unconstitutional as applied), appeals filed (S. Ct. Feb. 9, 1979).

likelihood that this case may not present a live controversy, either now or by the time the Court can consider and decide it, the case would plainly warrant the Court's noting probable jurisdiction.

The minority business enterprise provision at issue in this case does not violate either the Fifth Amendment or Title VI of the Civil Rights Act of 1964. The provision falls within Congress's authority to fix the terms and conditions under which it grants money,[8] as well as its special powers to enforce the objectives of the Civil War Amendments.[9] It is one of a number of statutes designed to eliminate discrimination from federally funded programs[10] and from particular areas of the economy or other spheres of activity in which the federal government has a substantial interest.[11]

[8] See *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 142-143 (1947); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

[9] See *Regents of the University of California* v. *Bakke*, *supra*, slip op. 33 n.41 (opinion of Powell, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

[10] See, *e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C. 1242; Energy Conservation and Production Act, 42 U.S.C. 6870; Comprehensive Employment and Training Act of 1973, 29 U.S.C. 991.

[11] See, *e.g.*, Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*; Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*; Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*

Congress was aware, when it enacted the 1977 Act, that minorities are represented in disproportionately low numbers in the ownership of businesses in general in this country, and in the construction industry in particular. See 122 Cong. Rec. S7147 (daily ed. May 13, 1976) (remarks of Sen. Javits); *id.* at S17907 (daily ed. Oct. 1, 1976) (remarks of Sen. Muskie, quoting a statement by Sen. Glenn). As of 1972, minority-owned firms represented only 4.3 percent of the total number of firms in the construction industry, and gross receipts for those firms constituted only about one percent of the gross receipts for all firms in the industry.[12] Minority businesses, moreover, have received only one percent of federal contract dollars. 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke).

Congress has sought to remedy discrimination against minorities in business enterprises through legislation of other kinds as well. Section 202 of the 1978 Amendments to the Small Business Act and the Small Business Investment Act of 1958,[13] for example, provided explicit statutory authorization for the Small Business Administration's Section 8(a) program to assist minority-owned businesses, a program that has

[12] Bureau of the Census, *1972 Census of Construction Industries, United States Summary—Statistics for Construction Establishments With and Without Payroll* Table A1 (Aug. 1975); Bureau of the Census, *1972 Survey of Minority-Owned Business Enterprises, Minority-Owned Businesses* Table 1 (May 1975).

[13] Pub. L. No. 95-507, 92 Stat. 1761-1763.

been upheld on several occasions. See, *e.g.*, *Valley Forge Flag Co.* v. *Kleppe*, 506 F.2d 243 (D.C. Cir. 1974); *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973).[14] The President has also sought to address these problems through measures such as Executive Order No. 11458, 34 Fed. Reg. 4937 (1969) and Executive Order No. 11625, 36 Fed. Reg. 19967 (1971). Yet despite these efforts, there remains

> [t]he very basic problem * * * that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.

H.R. Rep. No. 94-1791, 94th Cong., 2d Sess. 182 (1977).

The approach to the problem selected by Congress in the Public Works Employment Act of 1977—to ensure that minority firms receive a representative share of the federal funds expended on particular public works projects—is within the constitutional authority of Congress. In discussing cases decided

[14] See also the minority enterprises small business investment company program operated by the Small Business Administration under the authority of 15 U.S.C. 681(d), and the Surety Board Guarantee Program of the Housing and Urban Development Act of 1970, 15 U.S.C. 694a and b.

under Title VII of the Civil Rights Act of 1964, four members of the Court wrote in *Bakke*:

> [I]n order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination.

Regents of University of California v. *Bakke, supra*, slip op. 42 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Similarly, Mr. Justice Powell noted that the Court has recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." *Regents of the University of California* v. *Bakke, supra*, slip op. 33 n.41 (opinion of Powell, J.).

The provision at issue in this case is appropriately tailored to combat past discrimination in the construction industry. The beneficiaries of the provision are members of minority groups who have long suffered the effects of discrimination, even in programs supported by federal funds.[15] The statute assures flexibility by giving the Secretary the authority to

[15] Congress may generalize in identifying the victims of discrimination when, as here, measurement of the effects of discrimination on an individual basis is impractical or impossible. See *Regents of the University of California* v. *Bakke, supra*, slip op. 53 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Gaston County* v. *United States*, 395 U.S. 285, 295-296 (1969); *Califano* v. *Webster*, 430 U.S. 313 (1977); *Oregon* v. *Mitchell*, 400 U.S. 112, 216 (Harlan, J., concurring in part).

waive the ten percent requirement in appropriate cases, and the waiver provision in the regulations ensures that in circumstances where there are not sufficient qualified minority-owned businesses, the 10 percent set-aside provision will not apply. See 13 C.F.R. 317.19(b)(2). The minority set-aside provision applies to only .25 percent of the funds expended yearly on construction in the United States, and "the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry." *Fullilove* v. *Kreps, supra*, 584 F.2d at 607-608 (footnote omitted). Non-minority firms are not excluded from any particular portion of the work, nor are they foreclosed from competing with a non-minority contractor in any area they choose, since the statutory provision can be satisfied by a grantee's entering into prime contracts with a minority contractor or by prime contractors letting subcontracts or supply contracts with minority firms in any area they choose. Thus, in competing for each contract, a non-minority contractor is not "foreclosed from all consideration * * * simply because he was not the right color or had the wrong surname." *Regents of the University of California* v. *Bakke, supra*, slip op. 49 (opinion of Powell, J.). Finally, because the Public Works Employment Act of 1977 was designed to put funds in the hands of

grantees and in turn into the hands of contractors relatively quickly, it would have been difficult, if not impossible, to employ traditional policing devices to ensure that federal funds were not being spent in a discriminatory fashion. The minority business enterprise provisions of Section 103(f)(2) and the Secretary's regulations are therefore not in conflict with the Fifth Amendment to the Constitution.

The district court also erred in holding that Section 103(f)(2) was invalid for being in conflict with Title VI of the Civil Rights Act of 1964. As this Court has observed: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Moreover, even if there were any conflict between the two statutes, that conflict should be resolved in favor of the later-enacted statute, the Public Works Employment Act of 1977.[16] Finally, in *Bakke*, a majority of the Court concluded that Title VI does not prohibit a constitutionally valid, remedial race-conscious program. See *Regents of the University of California* v. *Bakke*, *supra*, slip op. 18 (opinion of Powell, J.); slip op. 5 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

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[16] That there is no conflict between the two is underscored by the incorporation of Title VI procedures in Section 110 of the 1976 Act, Pub. L. No. 94-369, 90 Stat. 1002, 42 U.S.C. 6709.

CONCLUSION

The judgment of the district court should be vacated and the case remanded to the district court to be dismissed as moot.

In the alternative, this Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted.

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MARCH 1979

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77-3738-AAH

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation; ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation; STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY, a corporation; GORDON H. BALL, INC., a corporation; STODDARD ENTERPRISES, a sole proprietorship; and GRANITE CONSTRUCTION COMPANY, a corporation, PLAINTIFFS,

v.

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF COMMERCE; LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, DEFENDANTS.

CHARLES ARMISTEAD; MARION HILL; LEO WEBB; RUDOLPHO A. TRUJILLO; HAROLD W. JOHNSON; AMERICAN ASS'N OF SPANISH SPEAKING CERTIFIED PUBLIC ACCOUNTANTS; BLACK BUSINESSMEN'S ASS'N OF LOS ANGELES; and NAACP, INTERVENORS.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

NOTICE IS HEREBY GIVEN that the Secretary of Commerce of the United States Department of Commerce and the United States Department of Commerce, defendants above-named, appeal to the United States Supreme Court from the Order entered in this action on October 20, 1978 entitled Memorandum Opinion and Order That Cause Is Not Moot and from the Summary Judgment for Declaratory and Injunctive Relief entered in this action on November 2, 1977. This direct appeal to the United States Supreme Court is made pursuant to 28 U.S.C. § 1252.

DATED: This 17th day of November, 1978.

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